In The

Supreme Court of the United States

FRANK A. ASH ET AL., *Petitioners*
v.
BARNSDALL OIL CO. ET AL., *Respondents*

No. 222

MARY ZACHARIE BROCK ET AL., *Petitioners*
v.
BARNSDALL OIL CO. ET AL., *Respondents*

*No.*_____

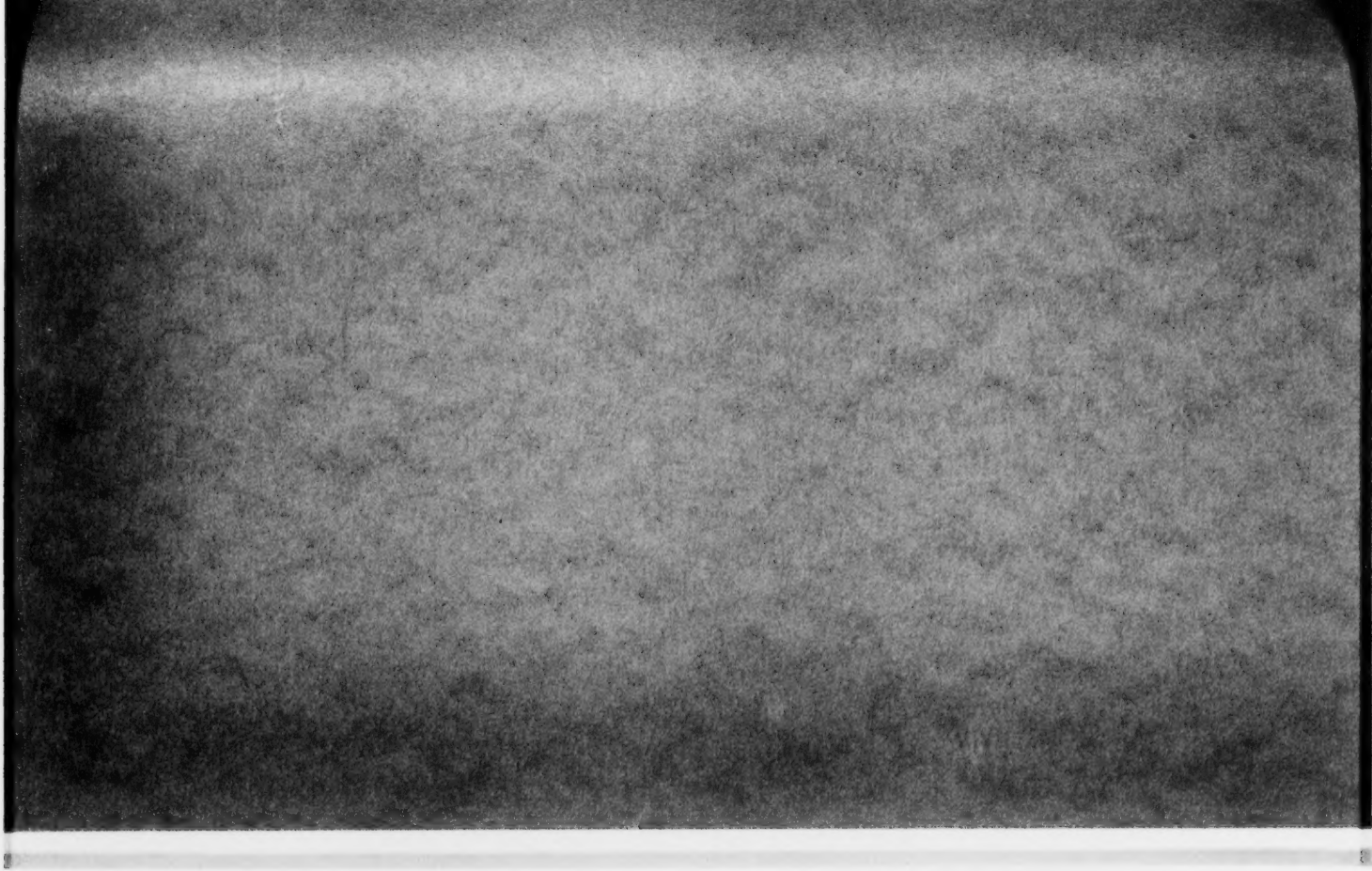
Reply of J. O. Phillips et al., Respondents, to Petitions for Certiorari to the Fifth Circuit Court of Appeals

---

DAVID B. TRAMMELL, *Fort Worth, Texas,*
Attorney for Respondents
J. O. Phillips et al.

PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN, *of Counsel.*

FORT WORTH LEGAL PRINTING CO., 302 W. 6TH ST. 2-4220



In The

Supreme Court of the United States

FRANK A. ASH ET AL., *Petitioners*
v.
BARNSDALL OIL CO. ET AL., *Respondents*
No. 222

MARY ZACHARIE BROCK ET AL., *Petitioners*
v.
BARNSDALL OIL CO. ET AL., *Respondents*
*No.*_____

Reply of J. O. Phillips et al., to Petitions for Writ of Certiorari

May It Please the Court:

The opinion of the Circuit Court of Appeals is reported *Ash v. Barnsdall Oil Co.*, 118 F. (2d) 699.

The probate sale attacked as void in these proceedings was made March 1, 1860, to pay expenses and costs of administration and debts during the course of a contest by the ancestors of petitioners Brock et al. and petitioners Frank A. Ash et al. (both of which sets of claimants have filed petitions for certiorari), over the ownership of the estate, which contest at the time of the sale had continued over four years and pended some eight years longer; the administrator's deed being made after application, order, advertise-

ment, report of sale and confirmation, all statutory requirements having been followed (R. pp. 516-527). Such deed was recorded October 10, 1860, in the Deed Records of Nueces County (R. p. 524) *and the title thus emanating from the probate sale has been the active title, evidenced by hundreds of deeds, mortgages, releases and other instruments (R. p. 753), while the claims of both sets of petitioners have remained inactive and unasserted for a period of more than seventy-five years until after oil was discovered on the property.* (Paragraph (n), R. p. 381.)

It is contended by both sets of petitioners that the sale was void because made by Samuel W. Fullerton as administrator pro tem. It is also contended by petitioners Frank A. Ash et al. that the effect of the writ of certiorari proceeding was to suspend the jurisdiction and power of the County Court to proceed with the administration, and further, that Cornelius Cahill, the Chief Justice of Nueces County who appointed Fullerton administrator pro tem originally, was disqualified because a debtor of the estate, and that this disqualification invalidated all subsequent proceedings, although Fullerton was recognized as such administrator by two Chief Justices succeeding Cahill (the sale being ordered by the second successor Chief Justice), no disqualification being urged against either of them. Reply to these contentions will be made briefly in their order.

It is respectfully urged that the petitions for certiorari be denied for the following reasons:

1. There is presented no question of public importance such as to authorize this court to assume

jurisdiction by certiorari, the questions involved being merely one of local law of the State of Texas, arising under an early statute providing for the administration of estates, and the Circuit Court of Appeals has conflicted with no Texas decision as next hereinafter shown. (Section 5 of Rule 38 of this Court; *In re Woods*, 143 U. S. 202, 36 L. Ed. 125; *Forsyth v. Hammond*, 166 U. S. 506, 514, 41 L. Ed. 1095, 1098.)

2. The decision of the Honorable Circuit Court of Appeals is not in conflict with the three decisions cited by petitioners for that: (*a*) *Alexander v. Barfield*, 6 Tex. 400, the only case arising under the Probate Act of 1848, did not involve a sale by an administrator, but the right of an administrator pro tem to sue where no such authority was conferred by the order appointing him, and therefore the decision of the Circuit Court of Appeals here could in no way conflict therewith.[1] (*b*) *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364, was decided **after** *(while the sale here questioned was made long prior to)* the Codification of 1879 of our Texas Statutes and the adoption of Art. 1882 of such Codification (now Art. 3379),[2] which

[1]The appeal was disposed of on another ground, and all that was said about administrators pro tem really dicta, the Court concluding that: "The case must be dismissed on the first point noticed, that there is no judgment in the court below from which an appeal will lie. Appeal dismissed." (6 Tex. 406.) The point is not stressed, however, as there was no conflict anyway.

[2]We quote such article:

"ART. 1882. Temporary administrators shall have and exercise only such rights and powers with regard to the estate, or such portions thereof as may be committed to their charge, as are specifically and clearly expressed in the order of the court appointing them, and any acts performed by them as such administrators that are not so expressly authorized shall be void." Revised Statutes of Texas of 1879, p. 279.

required the authority of the temporary administrator to be set forth in the order of appointment, denouncing all acts not so authorized as void. There was no compliance with this statute in *Dull v. Drake*, and the administrator neither gave bond, took oath nor returned inventory; there was no notice of sale, nor showing as to its necessity, nor even a sworn application for sale. As said by the court, the property was "*sold within a few days after the original grant of letters by a temporary administrator without compliance with a single prerequisite of such a sale prescribed by statute.*" (68 Tex. 207.) The failure of the order of appointment to confer power to sell, required by Art. 1882 adopted long subsequent to the sale here attacked, was recognized and followed by the court in saying: "*Our probate law does not contemplate that a temporary administrator shall have any powers except such as are expressly granted him by the County Judge at the date of his appointment.*" (68 Tex. 207.) Obviously, a decision under different law and a different state of facts cannot be said to conflict with the decision here, where every prerequisite of law was followed. (c) *Cruse v. O'Gwin*, 106 S. W. 757, was decided under the earlier Act of 1840 (which permitted the sale of real estate only after it appeared that the personal property was not sufficient Art. 1023, Hartley's Texas Digest, p. 331)[2] whereas

[2]Art. 1023, Hartley's Texas Digest, p. 331, being Sec. 29 of the Probate Act of February 5, 1840, under which *Cruce v. O'Gwin*, supra, was decided, reads:

"Be it further enacted, Every executor or administrator is bound, within three months after his appointment, to petition the Court of Probate, granting letters testamentary or administration, for the sale of all the perishable property belonging to the succession, and all or such

the Law of 1848 provided that sales should be made of that property most advantageous to the estate (Art. 1167, Hartley's Texas Digest)),[3] and under facts showing that the court at a special term appointed a temporary administrator and on the same date ordered him to sell the Robert Lucas League on credit. A report of sale was made, but there was no order of confirmation, and on the same day the administrator executed a deed the purchaser re-conveyed to him. Notwithstanding these facts, the court said that if there had been a confirmation or "*anything written on any paper filed in the case in the Probate Court that directly or indirectly indicated*

---

portion of the other personal property except slaves, as may be shown to the court to be necessary for the payment of debts against said estate; **and in case, or if on further information, he finds that the proceeds of the sale of the personal property will not be sufficient for the payment of the said debts, he shall then, within six months after his appointment, or as soon as he ascertains the said deficiency, petition the Probate Court for the sale of the slaves and real estate of the decedent, or so much thereof as may be necessary for the payment of the said debts**; and the said court, on full and satisfactory proof of the existence of the debts, and the necessity of the sale, shall order the same on cash or credit as may be most advantageous to said estate, or as the nature of the claims against said estate may require." (Emphasis volunteered.)

[3]Section 58 of the Probate Act of March 20, 1848 (Art. 1167, Hartley's Texas Digest, p. 371), under which the sale here attacked was made, reads:

"**ART. 1167 (58) That all sales for the payment of the debts owing by the estate, shall be ordered to be made of such property as may be deemed most advantageous to such estate to be sold**; Provided, however, That no order shall be made to sell the slaves belonging to an estate, for the purpose aforesaid, until all other property subject to the payment of debts has been first sold, and it shall be shown to the court that the proceeds of such sales are insufficient to pay such debts; unless it shall be necessary to sell such slaves, or a part thereof, for the satisfaction of some debt that is secured by mortgage or other lien, on them; or unless such estate shall, by the exhibit of the executor, or administrator, or by other evidence satisfactory to the court, appear to be insolvent." (Emphasis volunteered.)

approval of the sale by the Probate Court, we would sustain its validity under the authority of the decisions of the Supreme Court. Neill v. Cody, 26 Tex. 286; *Moody v. Butler,* 63 Tex. 210." (106 S. W. 759.) In view of the court's language it is apparent that it would have upheld the present sale and deed. *None of the cases relied upon by petitioners nor any other Texas case holds invalid a sale by an administrator pro tem ordered as here by the court upon application and confirmed after hearing, all as prescribed by the statute.*

3. In appointing the administrator pro tem the court followed in all respects Sections 27 and 28 of the Probate Act of March 20, 1848 (Arts. 1136 and 1137, Hartley's Laws of Texas, p. 361), there being pending a "contest relative to the probate of a will."

4. Samuel W. Fullerton, administrator pro tem, filed written application setting forth a necessity for the sale of a portion of the estate to pay expenses of administration and debts, accompanying such application with a statement (R. pp. 516-519) as required by Section 54 of the Probate Law of March 20, 1848. The court, after a public hearing at which Walter Merriman, attorney for James W. Zacherie (R. p. 183) testified, found that the facts set forth in the application were true; that there was no personal property belonging to the estate in the hands of the administrator subject to sale; that all of the other property was encumbered by litigation and that a necessity existed to sell the land in question, the sale of which would be most advantageous to the estate (R. pp. 519-521), in this respect following Section 58 of the Probate Act

(Art. 1167, Hartley's Laws of Texas, p. 371, quoted supra p. 5). The sale was made at public auction, was duly reported to the court and confirmed as required by Section 67 of the Act (Art. 1176, Hartley's Laws of Texas, p. 373),[5] and the conveyance was duly executed in accordance with such statute which provided that the "conveyance of land * * * so made shall

[5]Art. 1176, Hartley's Laws of Texas, p. 373, being Section 67 of the Probate Act of March 20, 1848, reads as follows:

"Art. 1176 (67) That when a sale of property is ordered under the provisions of this act, it shall be the duty of the executor or administrator to make such sale, or cause it to be made in obedience to the order, at the earliest period; and when such sale has been made, it shall be the duty of the executor or administrator, to return to the court that ordered the sale, an account thereof—either in term-time or vacation—within thirty days after the day of sale. Such account of sale shall be in writing—shall specify the property sold—the name of the purchaser—the price for which it was sold, and the terms of sale; and shall be sworn to and subscribed by such executor or administrator, before some officer authorized to administer oaths—whenever such account of sale is returned, such return shall be noted in the minutes of the court; and at the term of the court when it is returned or if returned in vacation at the first term thereafter, it shall be the duty of the Chief Justice to enquire into the manner in which such sale was made; and if satisfied that it was fairly made and in conformity with law, he shall cause to be entered on the minutes of the court a decree confirming it, and ordering the account of sales to be recorded by the clerk, and a conveyance to be made to the purchaser of either land or slaves, by the executor or administrator; if not satisfied that such sale was so made, he shall cause to be entered in like manner, a decree setting it aside and ordering a new sale to be made. After any such decree of confirmation shall have been made, upon the purchaser complying with the terms of sale, the executor or administrator shall execute and deliver to him a conveyance of the property so sold, if it were either land or slaves, reciting therein the decree confirming the sale, and ordering the conveyance to be made; which conveyance of land or slaves so made, shall vest the right and title that the testator or intestate had, in the purchaser; and shall be prima facie evidence that all the requisites of the law have been complied with in making the sale; and such decree of confirmation of the sale of personal property other than slaves, shall in like manner vest the right and title thereof in the purchaser, and shall be like evidence that all the requisites of the law have been complied with in making the sale of such personal property."

vest the right and title that the testator or intestate had in the purchaser and shall be prima facie evidence that all the requisites of law have been complied with in making the sale." (*Seefeld v. Duffer* (CCA 5 Tex.), 179 F. 214, 221.)

5. Section 135 of the Probate Act of March 20, 1848 (Art. 1244, Hartley's Texas Digest, p. 395)[6] provided that the rights, powers and duties of administrators should be governed by the principles of the common law when not in conflict with the provisions of the Act. Under the common law it was the duty of any administrator, temporary or otherwise, to pay debts and expenses of administration, for such purpose having the right to use any of the assets in his hands. (*Ellis v. Deane* (1847), Beatty's Cases in Chancery, p. 5; *Tichborne v. Tichborne* (1869), L. R. 2, P. & D. 41; *Adair v. Shaw*, 1 Schoales & Lefroy's Rep. (Irish) 243; *In re Ellmaker's Estate*, 4 Watts (Pa.) 36). Under our statute, any power that could be conferred on a regular administrator might be conferred on an administrator pro tem. (*Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; *Robinson v. Martel*, 11 Tex. 149), so that unquestionably the court could order a sale to pay expenses of administration and debts. But at all events the judgment attacked herein was a judgment of a court of general jurisdiction immune against collateral attack. (*Taffinder v. Merrill*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep.

[6]Section 135 referred to reads:

"ART. 1244 (125) That the rights, powers, and duties of executors and administrators shall be governed by the principles of the Common Law, where the same do not conflict with the provisions of this Act."

814; *Martin v. Robinson*, 67 Tex. 368, 379, 3 S. W. 550; *Dallas Joint Stock Land Bank v. Forsyth*, 130 Tex. 563, 109 S. W. (2d) 1046; *Carroll v. McLeod*, 133 Tex. 571, 130 S. W. (2d) 277; *Mast v. Orum*, 111 S. W. (2d) 1129, aff. 134 Tex. 105, 132 S. W. (2d) 105.)

6. The Schatzell petition for certiorari filed March 1, 1856 (R. p. 422), sought only to review and revise the proceedings of the County Court of Nueces County in denying their contest of the will of John Peter Schatzell and refusing a continuance, these being the only errors complained of and proceedings attacked in the petition (R. pp. 416-421). The effect of a certiorari proceeding under the Texas Statutes is confined "to errors of the County Court specifically set forth in the application for the writ" and does not suspend or affect any other ruling or proceeding (*Schwind v. Goodman* (Tex. Com. App.), 221 S. W. 579; *Leatherwood v. Stephens* (Tex. Com. App.), 24 S. W. (2d) 819; *LaFleur v. Switzer*, 109 S. W. (2d) 239; *Hurley v. White*, 66 S. W. (2d) 393; *George v. First Natl. Bank*, 67 S. W. (2d) 324, writ refused; *Wilson v. Fisher*, 105 S. W. (2d) 304, writ refused; *Landgraf v. Landgraf*, 114 S. W. (2d) 424), and the District Court of Nueces County by the petition for certiorari was invested with no other jurisdiction than to determine the alleged error in granting the application to probate the will and denying the contest thereof, clearly having no power to interfere with the sale of land by the administrator pro tem under orders of the County Court (authorities supra; also *Levy v. W. L. Moody & Co.*, 87 S. W. 205; *Pierce v. Foreign Mission*

Board (Tex. Com. App.), 235 S. W. 552; *Slay v. Davidson*, 88 S. W. (2d) 650, writ denied; *Pearson v. Holland*, 136 S. W. (2d) 920; *Mellinger v. Nicholson*, 142 S. W. (2d) 307).

7. Chief Justice Cahill was not disqualified, as held by the Circuit Court of Appeals, but if he were, the recognition of Fullerton as administrator pro tem by successor Chief Justices who were not disqualified, including the ordering of and confirmation of sale was sufficient on collateral attack. (*Seefeld v. Duffer* (CCA 5 Tex.), 179 F. 214; *Saul v. Frame*, 22 S. W. 984; *Moody v. Butler*, 63 Tex. 210; *Poor v. Boyce*, 12 Tex. 440, 449). The purchaser was not affected with notice of any alleged disqualification of Cahill in any event, not being required to go behind the application, order of sale, report of sale and order of confirmation, all of which proceedings were had long after Cahill retired from office. (*McNally v. Haynes*, 59 Tex. 583; *Poor v. Boyce*, 12 Tex. 440, 449; *Rindge v. Oliphint*, 62 Tex. 682; *Daimwood v. Driscoll*, 151 S. W. 621, writ denied; *Frost v. Crockett*, 109 S. W. (2d) 529, 535.)

Conclusion

It is respectfully prayed that the Petitions for Certiorari be denied.

DAVID B. TRAMMELL, *Fort Worth, Texas,*
Attorney for Respondents
J. O. Phillips et al.

PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN, *of Counsel.*

(29)

Office - Supreme Court, U. S.
FILED
AUG 25 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 222

FRANK A. ASH, ET AL., *Petitioners*,
v.
BARNSDALL OIL COMPANY, ET AL., *Respondents*

No. 222

MARY ZACHARIE BROCK, ET AL., *Petitioners*,
v.
BARNSDALL OIL COMPANY, ET AL., *Respondents*

REPLY BY FRANK A. ASH, ET AL., *Petitioners*, TO BRIEFS ON BEHALF OF *Respondents* OPPOSING WRIT OF CERTIORARI PRAYED FOR BY *Petitioners*

CHAS. M. ALDERSON,
Houston, Texas,
Attorney for Petitioners

Of Counsel:
PRITCHETT HARVEY,
Houston, Texas

ALPHA LAW BRIEF CO., HOUSTON

IN THE

SUPREME COURT OF THE UNITED STATES

No. 222

FRANK A. ASH, ET AL., *Petitioners,*
v.
BARNSDALL OIL COMPANY, ET AL., *Respondents*

No. 222

MARY ZACHARIE BROCK, ET AL., *Petitioners,*
v.
BARNSDALL OIL COMPANY, ET AL., *Respondents*

REPLY BY FRANK A. ASH, ET AL., *Petitioners,* TO BRIEFS ON BEHALF OF *Respondents* OPPOSING WRIT OF CERTIORARI PRAYED FOR BY *Petitioners*

MAY IT PLEASE THE COURT:

I

Such opposing briefs are conspicuously silent on the most important and vital ground set forth in our Petition; that is, the *Third* Ground, pages 12-13 in Petition for Certiorari. This ground is the Hamlet in this judicial tragedy.

For the purposes of this reply to such briefs, let us now re-examine such ground. Referring to pages 12-13 of Petition, we quote again from the opinion by the Honorable Circuit Court of Appeals, as follows:

> "Serious questions are raised as to whether the ultimate dismissal of the certiorari proceeding reinstated the probate of the will or left the parties out of court, and whether the bond given effected a proper supersedeas to stay probate proceedings. *As to these, we make no decision.*" (Italics ours.)

Upon such questions the trial court—the Federal District Court—ruled in favor of *Respondents,* in upholding the probate of the will and also holding as valid the sale by the administrator *pro tem* of a relatively small part of the great estate involved under the will.

Now, unlike the Federal District Court, the Circuit Court of Appeals *does not decide* questions involved as to "the probate of the will" and whether the "supersedeas" bond in the probate court, upon removal of the cause therefrom by certiorari to the District Court where trial ~~court~~ was de novo, under the Texas statute, "left the parties out of court," when the District Court subsequently dismissed the cause.

Referring to these questions, the Circuit Court says:

> "Serious questions are raised * * * *As to these, we make no decision.*" (Italics ours.)

The Schatzel will, here involved, covered a princely domain; the sale by Fullerton, administrator *pro tem,* covered only a small part of such domain.

As the case now stands, let us assume, for the purposes of this argument, that the *Respondents* have title duly adjudicated by the District and Circuit Courts, as to the lands *affected by the sale of the administrator.*

Even so, this leaves the lands *not affected by such sale by the administrator* clearly and unequivocally on the side lines of the decision by the Circuit Court of Appeals, under the express terms of the reservation—"As to these, we make no decision."

And what are these lands not covered by the sale of the administrator, but within the purview of the Schatzel will? And where is the title to these lands? The District Court says it passed under the Schatzel will; the Circuit Court of Appeals says, "we make no decision." If the Schatzel heirs at law assert title in another suit, will they be precluded and estopped by a Federal District Court decision which, upon appeal and presentation of such questions, the Circuit Court of Appeals, in express terms, says "we make no decision."

The Record herein (Tr. 443, 445), our *Petition* (pages 6, 7, 12), shows "Rincon" 1500 acres in the City of Corpus Christi, and Mustang Island (60 miles long and of great potential wealth), and the title to such property should not be the occasion for what is, in effect, a judicial "sit down strike" by the Circuit Court of Appeals.

Needless to say, a judicial decision by an appellate court, which, in its review of the holdings of the trial court, *withholds any ruling upon vital questions controlling title,* must place the administration of justice in a chaotic condition.

These vast properties of great value, the "Rincon" 1500 acres in the growing city of Corpus Christi, and Mustang Island in that same vicinity, are wholly outside the sale by Fullerton as administrator *pro tem* and in no manner affected thereby; but, as before stated, such large holdings are covered by the Schatzel will—the will which the Circuit Court of Appeals, for reasons beyond our ken, enshrouds in uncertainty, doubt and mystery by *withholding any decision upon the applicable questions pertaining to the validity of the will.*

"As to these (questions), we make no decision."

In the event these *Petitioners*—the heirs at law of Schatzel —institute suit seeking recovery of "Rincon" and Mustang Island, will it not be said that the judgments herein operate as an estoppel? If so, then these *Petitioners* are confronted with a condition whereby their asserted title will be defeated without even the gesture of a day in court—and through no fault on their part; because they duly urged such questions in the Circuit Court of Appeals. Is this due process of law as contemplated in our Federal Constitution?

From the standpoint of almost fabulous value, it would seem appropriate for this Honorable Court to review and reverse a judgment which "makes no decision" on such questions of great moment before it for decision.

And from the standpoint of assuring to the Bench and Bar the preservation of procedure looking to consistency and clarity in the administration of justice (and particularly in the judgments of the courts), it would seem that this Honorable Court may pertinently disavow the Circuit Court of Appeals' non-action in its ruling, "As to these (questions), we make no decision."

II

As to the other grounds in our Petition for Certiorari, we rest upon the authorities therein.

WHEREFORE, WE PRAY as in our said Petition.

Respectfully submitted,

CHAS. M. ALDERSON,
Houston, Texas,
Attorney for Petitioners

Of Counsel:
PRITCHETT HARVEY,
Houston, Texas